UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
	:	
SAMUEL ADAM BUSH,	:	05-93104-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the Motion for Relief from the Automatic Stay, filed by Washington Mutual Bank, F.A. (hereinafter the "Movant"), and the Motion for Recusal, filed by Samuel Adam Bush (hereinafter the "Debtor"), in the above-captioned bankruptcy proceeding. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(G); § 1334.

FINDINGS OF FACT AND PROCEDURAL HISTORY

The Movant was the holder of a first mortgage deed to secure debt on real property known as 812 East Morningside Drive, Atlanta, Georgia (hereinafter the "Property").[1] Pursuant to the power of sale contained within the deed to secure debt, Movant conducted a foreclosure sale of the Property on August 3, 2004 at 11:50 a.m. As the highest bidder, Movant purchased the Property for $714,000. On August 3, 2004 at 8:47 a.m., the Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code (case number 04-95893-WHD).

[1] Where applicable, the Court takes judicial notice of the Court's own record of the Debtor's previous bankruptcy filings.

The August 3, 2004 foreclosure sale represented Movant's third attempt to foreclose its interest in the Property. Two prior foreclosure attempts were thwarted by the Debtor's filing of two previous bankruptcy petitions on the morning of the foreclosure sales (case number 03-82945-WHD and case number 04-92844-WHD). The Debtor generally failed to prosecute his first two cases and voluntarily dismissed the cases after he successfully stopped the foreclosure sales.

On September 17, 2004, Movant filed a motion to annul the automatic stay in the Debtor's third case to permit the foreclosure sale, which was conducted approximately three hours after the Debtor had filed his third case, to stand. The Court held a hearing on the motion on October 4, 2004, at which time the Court granted the motion. A written order memorializing the Court's ruling was entered on October 6, 2004.[2] On the same day, the Court also dismissed the Debtor's Chapter 13 case pursuant to § 109(g)(1) because the Debtor had failed to attend the § 341 first meeting of creditors, and had failed to file a Plan and Schedules, had made no plan payments to the Chapter 13 Trustee, and the Debtor's past filing history indicated that the Debtor's case may have been filed in bad faith.

Subsequently, the Debtor sent a letter to the Court, in which the Debtor made a

[2] In that Order, the Court noted that, during the pendency of all three of the Debtor's cases, Movant had received no post-petition mortgage payments, resulting in the debt at issue becoming some twenty-two months delinquent by the time Movant filed its motion to annul the automatic stay. Additionally, the pre-petition arrearage owed to Movant at that time was approximately $117,614.70, and the Movant's total claim had reached $922,000.

personal attack on the Court and accused the undersigned of taking a bribe from the Movant in exchange for a favorable ruling. *See* Appeal Brief of Appellant, Samuel Adam Bush, Exhibit A, *Bush v. Washington Mutual Bank, N.A.*, 04-cv-03407-WBH. The Debtor also disclosed his intent to demand that the Federal Bureau of Investigation initiate an investigation into the Court's conduct and to file a complaint with the Eleventh Circuit Court of Appeals. *See id.*

On October 6, 2004, the Debtor appealed the Court's October 6th Order annulling the automatic stay. As the basis for his appeal of the Court's Order, the Debtor argued that the Movant had failed to present sufficient grounds to establish "cause" for lifting the automatic stay, such that the Court erred in concluding that the automatic stay should be annulled. In support of this argument, the Debtor alleged that the Court ruled in favor of the Movant despite the lack of any legal or factual basis because the Court had "obviously taken money under the table from [the Movant's] counsel to throw the case." The October 6th Order was affirmed by the District Court on March 2, 2005, and the Debtor did not appeal the District Court's order.

In the interim, the Movant had initiated a dispossessory proceeding in the Fulton County Magistrate Court, seeking to remove the Debtor from the Property. A hearing on the dispossessory proceeding was set for November 30, 2004. On November 29, 2004, the Debtor filed a Notice of Removal to the United States District Court for the Northern District of Georgia. On January 26, 2005, the District Court granted the Movant's motion for remand, concluding that the District Court lacked subject matter jurisdiction over the

dispossessory proceeding, and remanded the matter back to the Magistrate Court. *See Washington Mutual Bank, N.A. v. Bush*, 04-cv-03460-WBH (N.D. Ga. Jan. 27, 2005). The Debtor filed a Notice of Appeal of the District Court's remand order on February 7, 2005. The Eleventh Circuit Court of Appeals dismissed the appeal for lack of jurisdiction on April 29, 2005. *See Washington Mutual Bank, N.A. v. Bush*, 05-10681 (11th Cir. Apr. 29, 2005).

On March 30, 2005, the Debtor filed a complaint in the Superior Court of Fulton County, Georgia against the Movant, the law firm of Shapiro & Swertfeger, Sean R. Quirk, Esquire, and the undersigned. The complaint alleged that the undersigned accepted financial consideration from the Movant in exchange for a favorable ruling on the Movant's motion for relief, and, in doing so, conspired to violate the Debtor's civil rights. *See Complaint, Bush v. Washington Mutual Bank, N.A., et al.*, 05-cv-01198-TWT. The United States Attorney, acting on behalf of the undersigned, removed the matter to the United States District Court for the Northern District of Georgia.[3] On June 29, 2005, the District Court dismissed the complaint against the undersigned, finding that absolute immunity protected the undersigned from suit. *See Bush v. Washington Mutual Bank, N.A., et al.*, 05-cv-01198-TWT (N.D. Ga. Jun. 29, 2005).

On May 5, 2005, the Debtor filed a fourth voluntary petition under Chapter 13 of the Bankruptcy Code. According to the Debtor's response to the Movant's motion, the Debtor filed his fourth bankruptcy petition in order to prevent the Magistrate Court of Fulton County

[3] The matter was initially assigned to the Honorable Willis B. Hunt. Upon Judge Hunt's recusal, the matter was reassigned to the Honorable Thomas W. Thrasher.

from issuing an order compelling the Debtor to pay rent into the registry of the court. The Debtor's schedules, statement of financial affairs, and proposed Chapter 13 Plan were due to be filed by May 20, 2005, and the first meeting of creditors was set for June 21, 2005.

On May 27, 2005, the Movant filed a motion for relief from the automatic stay, in which it alleged that the various legal actions taken by the Debtor had successfully prevented the Movant from obtaining possession of the Property. The Movant sought relief from the stay to enable it to proceed with the dispossessory proceeding still continuing in the state court. A hearing on the Movant's motion was set for June 27, 2005, with notice of the hearing date sent to the Debtor on May 31, 2005.

On June 27, 2005, the Court called the matter for a hearing. The Movant's counsel appeared, but the Debtor did not.[4] The Court heard argument presented by the Movant and orally granted the Movant's motion. On July 1, 2005, the Debtor filed a response to the Movant's motion in which the Debtor opposes the lifting of the automatic stay, demands that the Court recuse itself from hearing the matter, and requests an extension of time for filing the missing documents in his bankruptcy case.

[4] The Debtor argues that he did not attend the hearing on June 27, 2005 because he received a copy of the Movant's counsel's conflict notice and assumed that no hearing would take place. The conflict notice does not indicate that the Movant's counsel would not attend the hearing, but merely puts the Court and the parties on notice of a potential conflict. The Debtor should have attended the hearing, or, at the least, contacted the Court to verify whether the hearing would go forward.

CONCLUSIONS OF LAW

A. *Recusal Is Not Appropriate*

"Pursuant to 28 U.S.C. § 455(a), a federal judge must recuse [himself] in any proceeding where [his] 'impartiality might reasonably be questioned,' where the judge 'has a personal bias or prejudice concerning a party.'" *Vasile v. Dean Witter Reynolds, Inc.,* 20 F.Supp.2d 465, 497-98 (E.D.N.Y. 1998) (citing 28 U.S.C. § 455(b)(1)). "The ultimate inquiry is whether 'a reasonable person, knowing all the facts, [would] conclude that the trial judge's impartiality could reasonably be questioned.'" *Id.* (citing *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir.1992)).

However, it is well recognized that a party's unilateral acts personally attacking or suing the judge for acts taken in his or her judicial capacity do not create a proper basis for recusal. Recusal under such circumstances would permit a party to avoid a particular judge simply by attacking or suing the judge. *In re Maurice*, 167 B.R. 114, 121-22 (Bankr. N.D. Ill. 1994) (denying a motion for recusal, noting that "'a debtor should not be permitted to frustrate the administration of justice by asserting frivolous claims against sitting judges'" and that the "'appearance of a conflict of interest is not created by the assertion of a frivolous claim against a judge'"); *Vasile v. Dean Witter Reynolds, Inc.*, 20 F.Supp.2d 465 (E.D.N.Y. 1998) ("Under § 455(b)(1), recusal is mandated only where the district court harbors actual prejudice or bias against a defendant; conclusory accusations stemming from a litigant's dissatisfaction with the court's ruling are insufficient to warrant recusal); *In re Betts*, 165 B.R. 233 (Bankr. N.D. Ill. 1994) (litigant should not be permitted to choose his or her own

judge by alleging frivolous grounds for recusal).

Nonetheless, there may be a very few, rare cases in which the personal attacks or law suits are so egregious that a reasonable person would perceive the judge as being biased. In such a case, the judge should recuse himself or herself in order to avoid the appearance of a conflict *See In re WHET, Inc.*, 33 B.R. 424 (Bankr. Mass. 1983); *In re Potter*, 292 B.R. 711 (Bankr. 10th Cir. 2002).

In *In re Potter*, all of the judges sitting on the Eighth Circuit Bankruptcy Appellate Panel denied a motion to recuse themselves, stating that:

> The plaintiff/appellant . . . has filed a civil suit in federal court against each of the judges on this panel in which he alleges that we have denied his constitutional rights in previous rulings. In that action, [appellant] seeks to prohibit us from hearing any matters to which he is a party. [citation omitted]. As judges, we are required to avoid the appearance of bias or partiality and to recuse ourselves if our "impartiality might reasonably be questioned." 28 U.S.C. § 455. After careful review, we find that [the appellant's] suit against us is not cause for our recusal. *See United States v. Grismore,* 564 F.2d 929, 933 (10th Cir.1977) *United States v. Studley,* 783 F.2d 934, 940 (9th Cir.1986) *United States v. Whitesel,* 543 F.2d 1176, 1181 (6th Cir.1976). A judge's duty to hear cases is not so ephemeral that it dissipates at the first sight of any potential bias or partiality towards one of the litigants. *United States v. Hines,* 696 F.2d 722, 729 (10th Cir.1982) ("[S]ection 455(a) must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice."). Moreover, "[t]he statute is not intended to give litigants a veto power over sitting judges, or a vehicle for obtaining a judge of their choice." *United States v. Cooley,* 1 F.3d 985, 993 (10th Cir.1993). *Cooley* expressly states that prior adverse rulings and "baseless personal attacks on or suits against the judge by a party" are not cause for recusal. *Id.* On this basis, we believe our hearing

> of this case to be proper and indeed mandatory. Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir.1987) (per curiam) ("There is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.").

In re Potter, 292 B.R. 711 n.1 (10th Cir. BAP 2002).

Additionally, in *In re WHET, Inc*., the court denied the recusal request (the fifth such request filed) of a party who had accused the judge of being involved in a plot against him. *See In re WHET, Inc.*, 33 B.R. 424 (Bankr. Mass. 1983). The party stated in filed pleadings, as well as in letters to the judge, the FBI, the IRS, the Court of Appeals, and the judge's relatives, among others, that the judge was working with "other bankruptcy scum" to steal the assets of the debtor (a TV station owned partially by the party) for the benefit of the "Bankruptcy Ring." Additionally, the party accused the judge of being involved in a plot to kidnap him. In the motion for recusal, the party argued that the judge was biased because of his involvement with the Bankruptcy Ring. Additionally, the party argued that a reasonable person would perceive the judge as being biased because the party seeking recusal had initiated investigations and lawsuits against the judge. Finally, the party alleged that the judge had refused to recuse himself because he was intent on hearing the case for the purpose of covering up the fraud that he had committed. *See id.*

The court recognized that, in some cases, courts err on the side of recusal whenever there is an appearance of bias, regardless of whether the facts alleged are true. Nonetheless, the court opined that a court should not use recusal as a means to avoid hearing difficult or

controversial cases and concluded that the party had presented no evidence to support the factual allegations that the judge was involved in any extra-judicial conduct or conspiracy. *See id.*

Further, the court considered the argument that, because the party had filed three lawsuits against him, and had requested certain federal agencies to investigate him, a reasonable person would not view him as impartial (the party even requested to be permitted to present testimony to the federal grand jury himself, rather than allow the attorney general to do it, alleging that the attorney general was the judge's friend). The court concluded that these were not grounds for recusal because they were unilaterally created by the party seeking recusal. Additionally, the court took judicial notice of the fact that the party had acted in this manner toward other judges and individuals in the past, and of the fact that the party's conduct appeared to result from the fact that he had so exhausted his meritorious legal remedies that he had no other option. Given the situation, the court concluded that a reasonable person with all of the facts, would not find that the judge was biased. *See id.*.

Clearly, there will be cases in which personal attacks upon the judge are so egregious, or allegations made in a lawsuit possibly may have some potential basis in fact, that recusal will be warranted. If the attacks or allegations would cause a reasonable judge to lose his or her impartiality, at least an appearance of a conflict will result, and, even if the particular judge felt that he or she were still impartial, it would be best to avoid the appearance that the judge is biased. Having read those few cases in which this has been found to be the case, the Court must conclude that this case does not rise to that level. *See United States v. Pina*, 844

F.2d 1, 14 (1st Cir. 1988) (where a criminal defendant subjected the trial judge to an onslaught of vulgar, personal attacks throughout the course of a lengthy trial, the appellate court concluded that it was doubtful that "anyone 'so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication'").

The facts of this case are more in line with the facts of the *WHET, Inc.* and *Potter* cases. Here, the Debtor has made conclusory, frivolous allegations against the Court that have never been substantiated with any evidence. Further, these allegations appear to stem directly from the Debtor's dissatisfaction with the Court's ruling in his prior bankruptcy case. The Court is also aware from the Debtor's response to the Movant's motion that the Debtor has similarly accused at least one United States District Court judge of making a ruling based upon extra-judicial information and has accused the entire appellate court system for the State of Georgia of being corrupt. *See Debtor's Response to Movant's Motion to Lift the Automatic Stay and Debtor's Cross-Motion for an Extension of Time to File the Balance of Debtor's Bankruptcy Papers and Motion for Recusal of the Court,* at 2. If the leveling of unsupported accusations is sufficient to render a judge biased and to force recusal, the Debtor could conceivably run through all of the Federal and State court judges available to hear his cases in a very short time. Under these circumstances, the Court must conclude that a reasonable person would not find that the Debtor's action have prejudiced the undersigned toward the Debtor. Additionally, recusal would be a neglect of the Court's duty to hear a difficult case and would permit the Debtor to further delay proceedings that must soon have finality. Therefore, the Debtor's Motion for Recusal must

be denied.

B. *In Rem Relief From the Automatic Stay Is Justified*

Upon the filing of a bankruptcy petition, all actions against the debtor or property of the debtor's bankruptcy estate are automatically stayed. *See* 11 U.S.C. § 362(a)(1);(a)(2); (a)(3). Section 362(a)(3) is not implicated here, as the Debtor has no legal or equitable interest in the Property. By virtue of the Court's October 6th Order annulling the automatic stay as it pertained to the Property, the Movant's August foreclosure sale of the Property was deemed to have been completed on August 3, 2004, prior to the filing of the Debtor's bankruptcy petition on August 3, 2004 and prior to the filing of the instant case. Legal title to the Property passed to the Movant on that date, and any equitable interest in the Property or right of redemption the Debtor may have had was also extinguished at that time. *See In re Morgan*, 115 B.R. 399, 401 (Bankr. M.D. Ga. 1990) (citing *Cumming v. Johnson*, 218 Ga. 559 (1963) (under Georgia law, a properly conducted foreclosure sale cuts off the debtor's right of redemption); *In re Pearson*, 75 B.R. 254 (Bankr. N.D. Ga. 1985) (Drake, J.). Accordingly, when the Debtor filed the instant bankruptcy proceeding, the Property did not become part of the Debtor's bankruptcy estate, and the automatic stay does not protect the Property. *See Morgan*, 115 B.R. at 401.

Section 362(a)(1) operates to stay any proceeding against the Debtor, which would include a dispossessory proceeding designed to evict the Debtor from the Property, and § 362(a)(2) prevents a party from enforcing any judgments, including a writ of possession,

against the Debtor. *See* 11 U.S.C. § 362(a)(1); (a)(2). Of course, the Movant may be entitled to relief from these provisions of the automatic stay in accordance with § 362(d). *See* 11 U.S.C. § 362(d). Pursuant to § 362(d)(1), the Court can grant relief from the stay "for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362(d)(1).

Under Georgia law, when the debtor remains in the property following a lawful foreclosure sale, the debtor is "a tenant at sufferance and can be summarily dispossessed by the purchaser." *Morgan*, 115 B.R. at 402 (citing *Remy v. Citicorp Person-to-Person Financial Center, Inc.*, 159 Ga. App. 726 (1981)). In such a case, "cause" exists to lift the automatic stay to permit the purchaser to return to state court to evict the debtor. *See id*. This is the case because the debtor has lost all legal and equitable rights to the property and will not be permitted to decelerate the default on the mortgage or cure any arrearage through a Chapter 13 plan. *See* 11 U.S.C. § 1322(c)(1); *see also In re Sims*, 185 B.R. 853, 867 (Bankr. N.D. Ga. 1995) (lifting the automatic stay pursuant to § 362(d)(1) because a pre-petition foreclosure sale had divested the debtor of any means of reinstating and curing the mortgage). Accordingly, no legitimate bankruptcy purpose would be served by leaving the automatic stay in place, and doing so would permit the debtor to further frustrate the state law rights of the purchaser and would constitute an abuse of the Bankruptcy Code. "Cause" for lifting the stay can also include a debtor's inability to provide the creditor with adequate protection of its interest in property and the debtor's abuse of the bankruptcy process. *See* 11 U.S.C. § 362(d)(1)*; see also In re Webb*, 294 B.R. 850 (Bankr. E.D. Ark. 2003); *In re*

Goulding Place Developers, Inc., 99 B.R. 493 (Bankr. N.D. Ga. 1989) (Cotton, J.) (citing *In re Phoenix Piccadilly, Ltd.*, 849 F.2d 1393 (11th Cir. 1988) (abusive Chapter 11 filing constitutes "cause" for lifting the stay).

In this case, the Court's basis for holding that "cause" exists to lift the stay is, as discussed above, the Court's determination that the foreclosure sale conducted on August 3, 2004 divested the Debtor of any legal or equitable right in the Property. Setting aside the issue of whether the Debtor could propose a feasible plan for repaying such a large arrearage within the required time, the Debtor would be unable to propose a confirmable plan that would provide for the reinstatement and cure of the mortgage. Additionally, there is no question that the Movant's interest in the Property is not being adequately protected throughout this process. The Movant has apparently received no payments or rent from the Debtor in several years, yet the Movant is currently unable to recover the Property and liquidate its investment.

The Debtor has argued that he should be permitted to avail himself of the protections of the Bankruptcy Code while he continues to attempt to establish that the Movant's foreclosure was invalid. However, the Debtor did not appeal the District Court's order affirming this Court's October 6th Order, which established that the foreclosure sale was not void for having been conducted after the filing of the Debtor's bankruptcy petition. Accordingly, the Court's October 6th Order is final, and the Court's determination on that issue is also final. Additionally, the Debtor has never argued or presented any evidence to suggest that the August 3, 2004 foreclosure sale was not conducted properly in accordance

with applicable nonbankruptcy law. The Court finds no reason to delay lifting the automatic stay to permit the Movant to settle these issues in state court. Therefore, the Court will grant the Movant's motion to lift the automatic stay.

Movant has requested *in rem* relief, which would prevent an automatic stay from arising with regard to the Property should the Debtor file a subsequent case following the dismissal of the Debtor's current case, or should anyone claiming ownership or possession of the Property through the Debtor subsequently file a bankruptcy petition. Such relief is permissible, pursuant to § 105 and § 362(d)(1), in cases in which the Court determines that *in rem* relief is necessary to prevent a debtor from continuing a pattern of abusing the bankruptcy system and the automatic stay and to afford effective relief to a creditor. *See In re Amey*, 314 B.R. 864, 869-70 (Bankr. N.D. Ga. 2004). Such an order is entered without prejudice to other parties' rights to move the Court in any subsequent case for the entry of a stay. *See id.*

Having considered the facts and history of the relationship between the Movant and the Debtor, the Court finds that *in rem* relief is necessary to afford effective relief to the Movant. Therefore, the Movant's request for *in rem* relief shall also be granted.

C. *Additional Time for Filing Schedules and Plan*

The Debtor has requested additional time to file the remainder of the documents required by § 521(a)(1). Presumably, if the Debtor intends to continue prosecuting the instant case, he would also require a rescheduled date for his first meeting of creditors.

Although the Court has doubts as to whether the Debtor will find any need to continue prosecuting this case, the Court will afford the Debtor an opportunity to do so.

The Debtor shall have until the close of business on **July 29, 2005** to file a complete list of creditors, all schedules, a statement of financial affairs, and a proposed Chapter 13 plan. If the Debtor files all documents by that date, the Debtor may contact the Chapter 13 Trustee to obtain a reset date for a first meeting of creditors. If the Debtor obtains a reset date, the Chapter 13 Trustee shall inform the Court of the date selected, and the Court will renotice the creditor's meeting and will set a new date for the hearing on confirmation of the Debtor's plan.

CONCLUSION

For the reasons stated above, the Motion for Recusal, filed by Samuel Adam Bush, is **DENIED;**

The request for an extension of time to file documents, filed by Samuel Adam Bush, is **GRANTED;**

The Motion for *In Rem* Relief from the Automatic Stay, filed by Washington Mutual, F.A., is hereby **GRANTED,** with the exception of the request for a waiver of the effects of Rule 4001(a)(3). The filing of a petition for relief under Title 11 of the United States Code by any person acquiring or claiming an ownership or other interest in the Property from, by, or through Debtor shall not result in the imposition of the automatic stay pursuant to 11

U.S.C. § 362(a) in any such case with regard to enforcement by Movant, its successors, or assigns, of its rights under state law.

In accordance with Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure, the instant order shall be stayed for ten (10) days after entry.

IT IS SO ORDERED.

At Atlanta, Georgia, this _____ day of July, 2005.

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W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE